Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

BARBARA A. SILBER, *et al.*,

Petitioners,

v.

BARBARA K. SILBER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

ERISA requires "that employee-benefit plans be administered, and benefits be paid, in accordance with plan documents", *Egelhoff v. Egelhoff*, 532 U.S. 141, 150 (2001); *see* 29 U.S.C. § 1104(a)(1)(D); that the beneficiary of an ERISA plan is the "person designated by a participant, or by the terms of an employee benefit plan", 29 U.S.C. § 1002(8); and that benefits under ERISA pension plans are not to be "assigned or alienated" away from participants and their beneficiaries, 29 U.S.C. § 1056(d)(1). In furtherance of the core ERISA concerns of uniformity, predictability, and efficient plan administration, this Court has consistently held that state law inconsistent with these provisions is preempted by ERISA.

Notwithstanding the clear statutory mandate that the identity of the plan beneficiary must be determined by ERISA or the plan documents, the New York Court of Appeals has held that the duly-designated plan beneficiary may be altered under the federal common-law doctrine of waiver. There is a substantial division among the federal circuits and state courts of last resort concerning whether to recognize such a federal common-law doctrine. The New York Court of Appeals, like most of the courts recognizing the waiver doctrine, has looked to state law in articulating the contents of federal common law.

The question presented is whether state courts and inferior federal courts are to follow this Court's commands that the payment of benefits is governed by the plan documents and that state law to the contrary is preempted, or whether through the device of incorporating state law into federal common law those courts may avoid this Court's holding and determine on a case-by-case basis (often requiring a jury trial) whether common law requires the plan documents to be ignored.

PARTIES TO THE PROCEEDINGS

Petitioners are Barbara A. Silber, Jeffrey Silber, Michael Silber, Andrea Silber Dickey and Laura Silber.

Respondent is Barbara K. Silber, individually and as Executrix of the Estate of Robert Silber, deceased.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of New York in this case.

OPINIONS BELOW

The decision of the Supreme Court of the State of New York, County of New York (per Cahn, J.), granting petitioners' summary judgment motion (Appendix ("Pet. App.") 25a) is unpublished. The opinion of the Appellate Division, First Department, of the Supreme Court of the State of New York (per Williams, J.P.), reversing and granting respondents' motion for summary judgment (Pet. App. 14a) is published at 290 A.D.2d 156, 739 N.Y.S.2d 116. The opinion of the Court of Appeals of New York affirming the decision of the Appellate Division (Pet. App. 1a) is published at 99 N.Y.2d 395, 757 N.Y.S.2d 227, 786 N.E.2d 1263.

STATEMENT OF JURISDICTION

The Court of Appeals of New York entered its opinion and order on February 18, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.* ("ERISA"), relevant to this petition are reprinted in the Appendix at 40a.

STATEMENT OF THE CASE

Petitioners are the first wife, Barbara A. Silber ("Barbara A."), and children of the late Dr. Robert Silber, to whom Barbara A. was married for 31 years. Respondent Barbara K. Silber ("Barbara K.") is Dr. Silber's second wife. Following Dr. Silber's death in 1998, Teachers Insurance Annuity Association and College Retirement Equity Fund ("TIAA-CREF"),[1] the plan administrator for two pension plans in which Dr. Silber was enrolled, refused to distribute to Barbara K. that portion of death benefits under the pension plans for which Barbara A. remained the designated beneficiary under the plan documents.[2]

Barbara K. then initiated this case, individually and as executrix of Dr. Silber, in the Supreme Court of the State of New York, County of New York, seeking a declaration of her entitlement to the death benefits under Dr. Silber's pension plans that TIAA-CREF had refused to distribute to her. The trial court granted summary judgment to Barabara A. concluding that the language of the QDRO was not sufficiently specific to constitute a waiver, as it nowhere

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1. TIAA-CREF, a defendant in the original action, did not participate in either of the appeals below.

2. As described below, TIAA-CREF had received a Qualified Domestic Relations Order ("QDRO") signed by Barbara A., Dr. Silber, and Barbara K. pursuant to which "[e]ach party expressly waive[d] any rights against the other and the other's estate and release[d] the other and the other's estate from all claims, except for those rights and claims under this Qualified Domestic Relations Order". That QDRO did not effect a change in beneficiary, leaving the Court of Appeals to rely upon the doctrine of common-law waiver.

specifically referred to the death benefits to be paid under the pension plans. The Appellate Division of the Supreme Court reversed, holding that the QDRO signed by Barabara A. did effectuate a waiver to the death benefits under the plans. The Court of Appeals affirmed, holding that a claim of waiver may be asserted against a designated beneficiary where the purported waiver comports with the federal and state common law requirements of waiver.

As set forth in detail below, the New York Court of Appeals' decision merits this Court's review because the federal common-law waiver permitted by the Court of Appeals, and by four federal Circuits, threatens to eviscerate this Court's decision in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), which requires payments of plan benefits to be made in accordance with the plan documents. ERISA creates a certain and manageable system under which plan administrators can determine the identity of the beneficiary through simply reviewing the plan documents (with a few limited and carefully-tailored exceptions explicitly provided by ERISA). In contrast, the New York Court of Appeals' open-ended holding that a beneficiary may be changed under federal common law – and that state law may be a source of that federal common law – will rewrite ERISA's straightforward requirement that the beneficiary be determined solely under ERISA and the plan documents, thus opening the door to all of the burdensome inconsistencies, uncertainties, and expense that this Court has sought to avoid through its preemption jurisprudence. *See Egelhoff*, 532 U.S. at 149 (uncertainty and inconsistency will result in "burdens ultimately borne by the beneficiaries"); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993) ("[t]he authority of courts to develop a 'federal common law' under ERISA is not the authority to revise the text of the statute"; citation omitted).

1. Petitioner Barbara A. was married to Dr. Silber from 1954 until they divorced in 1985. The couple had four children, Jeffrey Silber, Michael Silber, Andrea Silber Dickey, and Laura Silber (together, the "Children"), all petitioners herein. In the 1960s, through his employment at the New York University Medical Center, Dr. Silber enrolled in two annuity pension plans with TIAA-CREF. The pension plans were and are governed by ERISA. The contracts relating to both plans required that changes to beneficiary designations be made in writing and filed with TIAA-CREF at its home office and in a form satisfactory to it as the plan administrator. In 1967, Dr. Silber named Barbara A. as the primary beneficiary of the retirement account and named the Children as contingent beneficiaries. Several times over the ensuing years, Dr. Silber made changes to the beneficiary designation by using the required change of beneficiary form supplied by TIAA-CREF.

Under the divorce decree entered by Dr. Silber and Barbara A. in 1985, Barbara A. was to receive 25% of any TIAA-CREF retirement benefits received by Dr. Silber during his lifetime, and Barbara A. was to be named as 50% beneficiary of his death benefits if he died before his retirement. In April 1986, Dr. Silber filed the required change of beneficiary form with TIAA-CREF naming Barbara A. as 50% beneficiary and the Children and a family friend sharing the remaining 50%. During this period, Dr. Silber made several subsequent changes to the beneficiary designation with respect to the named contingent beneficiaries, but maintained Barbara A. as a 50% beneficiary.

In 1992, Dr. Silber married his second wife, respondent Barbara K. In 1992 and 1993, Dr. Silber made additional changes to his beneficiary designation using the TIAA-CREF

required change of beneficiary form. In accordance with the 1993 change in beneficiary designation, Barbara A. and Barbara K. each were named as 50% beneficiaries and the Children as contingent beneficiaries.

In 1998, Dr. Silber, Barbara A. and Barbara K. entered into a Qualified Domestic Relations Order ("QDRO") by which separate annuities were created in Barbara A.'s name, funded by 45% of the accumulations of Dr. Silber's TIAA-CREF pension plans. The QDRO also included the following provisions:

> 3. * * * All ownership rights in the newly issued annuities will belong to Alternate Payee [Barbara A. Silber]. All ownership and interest in the balance of the accumulations in all contracts issued by the Pension Plan [TIAA-CREF] will belong to Participant [Robert Silber]. * * *
>
> 8. This Qualified Domestic Relations Order supersedes all prior orders or judgments of this Court and all prior agreements of the parties and neither party shall have any further rights against the other either under any of the prior orders or judgments of this Court or under any of the agreements between them all of which rights and/or obligations arising thereunder have been previously fully executed and satisfied. Any further rights either party has against the other or against their respective estates shall arise solely under this Qualified Domestic Relations Order.
>
> 9. Each party expressly waives any rights against the other and the other's estate and releases the

> other and the other's estate from all claims, except for those rights and claims under this Qualified Domestic Relations Order.
>
> 10. Participant's present wife, Barbara K. Silber, has signed this Order as a party and hereby waives any claim she might have to any part of Participant's Pension Plan that is being assigned to Alternate Payee herein. Barbara A. Silber waives any rights or claims she might presently have against Barbara K. Silber on her estate.

On June 23, 1998, the QDRO was delivered to the TIAA-CREF plan administrator who acknowledged its receipt and agreed to "comply with all the applicable terms and conditions of said Order upon receipt of the proper documentation." In a letter to Dr. Silber dated July 13, 1998, TIAA-CREF made reference to the QDRO and stated, "If you have not already done so, you may want to change the beneficiaries of your annuity contracts. If you choose to change your beneficiaries, please complete the enclosed change of beneficiary form." Dr. Silber never returned the change of beneficiary form to TIAA-CREF. He died on November 3, 1998.

In accordance with the last beneficiary designation made on June 3, 1993, TIAA-CREF distributed 50% of the pension plans' death benefits to Barbara K., but did not distribute the remaining 50%. Barbara K. then commenced an action, both in her individual capacity and as executrix of her husband's estate, seeking a declaration that she was entitled to all of Dr. Silber's TIAA-CREF death benefits. Both parties sought summary judgment. Petitioner Barbara A. contended that the June 3, 1993, change of beneficiary designation, naming her

as 50% beneficiary, controlled. Respondent Barbara K. contended that Barbara A. waived her right to the death benefits in the May 1998 QDRO and that the QDRO itself effected a new beneficiary designation.

2. The trial court ruled in favor of Barbara A., concluding that the language of the QDRO was not specific enough to constitute a waiver. The court found that the QDRO did not specifically refer to the benefits or policies at issue and therefore did not amount to a waiver by Barbara A., and that, accordingly, the June 3, 1993 designation remained in effect. The court further found that if the QDRO had amounted to an effective waiver by Barbara A., the Children, not Barbara K., would receive the 50% of the proceeds as the contingent beneficiaries.

3. The Appellate Division, First Department, reversed the trial court's decision, finding that the court's ruling was contrary to "the intent of the parties to the QUADRO, the intent underlying the ERISA exception providing for QUADROS, and the Federal common law on the issue of waiver in this context." The Appellate Division reasoned that whether a former spouse designated as the primary beneficiary of an ERISA pension plan can waive rights to pension proceeds is an issue that is not expressly addressed by ERISA and therefore federal law must be considered in order to decide the issue. The court recognized that the federal circuit courts are split on the issue of whether the text of ERISA itself is sufficient to decide the issue or whether resort to federal common law must be had. The court ruled that federal common law applies and that to be valid a waiver must be explicit, voluntary, and made in good faith. Under that reasoning, the court found that it was not necessary for the QDRO to identify specifically the particular

"plan proceeds" or "beneficiary interest" in order to accomplish an effective waiver. The court found further that it was clear that, in considering the QDRO as a whole, a valid waiver was made by Barbara A. in that it was explicit, voluntary, and made in good faith. The court held that its finding was not inconsistent with this Court's holding in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), because *Egelhoff* involved a state statute that was preempted by the plain text of ERISA and that preemption is not an issue in this case due to the exemption of a QDRO from ERISA preemption. The court found further that the fact that the plan documents were used to determine the beneficiary in *Egelhoff* was of no consequence here because a QDRO that is duly executed and submitted to the plan administrator becomes a de facto plan document.

4. On petitioner's appeal, the Court of Appeals affirmed the Appellate Division's decision, concluding that a claim of waiver may be asserted against a designated beneficiary where the purported waiver meets the federal and state common-law criteria for waiver and that, under this criteria, Barbara A. waived her rights to the disputed pension benefits.

The Court of Appeals explained that "unlike ERISA's authorization of designation of beneficiaries through a QDRO, the statute does not address whether, or how, a party may challenge a designated beneficiary based on a claim of waiver." The court also noted that federal courts disagree as to whether ERISA even authorizes a claim of waiver. The court sets out the "common law view" by which the party challenging payment to the named beneficiary is permitted to show that the beneficiary executed a waiver that meets common-law requirements. "Just as ERISA's anti-alienation provisions do not preempt a valid QDRO from effecting a

beneficiary designation, those provisions do not prevent a valid waiver of beneficiary interests." The Court of Appeals rejected the argument by petitioner that, under *Egelhoff*, ERISA requires that a plan administrator discharge its duties solely in accordance with plan documents regardless of the variations and impact of state law. The court terms this the "plan document" approach and notes that the Sixth Circuit has unequivocally adopted the approach. In this view, only a plan document, such as a plan-generated change of beneficiary form or a QDRO that meets ERISA requirements and expressly designates a new beneficiary, can change a beneficiary designation, and courts may not apply common-law doctrines such as waiver to override an otherwise valid beneficiary designation.

The Court of Appeals followed the "common law" view followed by the Fifth and Seventh Circuits and ruled that Barbara A. had executed a valid waiver (and, at least implicitly, that this waiver required a change in beneficiary from Barbara A. to Barbara K., rather than a change to the Children or permitting Dr. Silber to decide whether to make a change). The court maintained that there are sound reasons to preserve the availability of a waiver claim in ERISA cases, reasoning that "strict application of ERISA requirements, while likely serving the ends of uniformity, may not serve the ends of fairness when it comes to effectuating the clear intent of parties to an agreement."

5. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. SUMMARY OF THE ARGUMENT

The petition should be granted to avoid the evisceration of this Court's decision in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). In *Egelhoff*, this Court held that ERISA preempted a state statute to the extent it provided that the designation of a spouse as the beneficiary of an ERISA plan was automatically revoked upon divorce. In so holding, this Court made clear that ERISA requires payments of plan benefits to be made in accordance with the plan documents, and that this requirement furthers the core ERISA concerns of uniformity, predictability, and efficient plan administration:

> [T]he statute at issue here directly conflicts with ERISA's requirements that plans be administered, and benefits paid, in accordance with plan documents. . . .

Id. at 150.

> [U]nder the text of ERISA, the fiduciary "shall" administer the plan "in accordance with the documents and instruments governing the plan," . . . . [The] statute conflicts with this command because under this statute, the only way the fiduciary can administer the plan according to its terms is to change the very terms he is supposed to follow.

Id. at 151 n.4 (citations omitted).

> Requiring ERISA administrators to master the relevant law of 50 States and to contend with litigation would undermine the congressional goal

> of "minimiz[ing] the administrative and financial burden[s]" on plan administrators – burdens ultimately borne by the beneficiaries.

Id. at 149-50 (citations omitted).

Unfortunately, the New York Court of Appeals has ignored *Egelhoff*'s clear teaching and held that federal common law permits a beneficiary to waive benefits, even without authorization under ERISA and even without compliance with the plan documents. In so holding, the Court of Appeals joins at least four federal circuits in permitting federal common law waivers, including the Seventh Circuit, which has reiterated this position after *Egelhoff*. *See Melton v. Melton*, 324 F.3d 941, 944-46 (7th Cir. 2003). In contrast, two federal circuits and the Supreme Court of Texas reject the view adopted by the New York Court of Appeals.

While not technically a matter of preemption, since the New York Court of Appeals purports to rely on federal common law, the resolution of the issue presented by this appeal is essential to effectuate the holding of *Egelhoff*. Although Congress intended for the courts to develop a federal common law under ERISA, *see, e.g.*, *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 377 (2002), "[t]he authority of courts to develop a 'federal common law' under ERISA is not the authority to revise the text of the statute". *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (citation omitted). As *Egelhoff* makes clear, ERISA requires plan administrators to pay benefits in accordance with plan documents. Creation of a federal common law rule varying this explicit requirement is not only contrary to the express language of ERISA, but it creates precisely the same problems addressed by *Egelhoff* – compromising certainty, uniformity,

and efficiency, and requiring the payment of benefits to await the completion of expensive and uncertain litigation over the inherently fact-intensive issue of waiver.

To make matters worse, the New York Court of Appeals, like the other courts that have permitted common law waiver, has chosen to look to state law as a source of federal common law. Thus, although nominally a matter of federal common law, the ruling below offers an enormous loophole that permits courts essentially to disregard *Egelhoff* by recharacterizing preempted state law rules as authorized federal common law rules.

Finally, the very existence of a split, not just among states and circuits but *within* them (the New York Court of Appeals' decision is contrary to the position of the Second Circuit and the Supreme Court of Texas has declined to follow the Fifth Circuit) creates substantial uncertainty and inconsistency (as well as an opportunity for forum shopping) that this Court should remedy promptly by granting a writ of certiorari and establishing a uniform rule.

II. THE NEW YORK COURT OF APPEALS' RECOGNITION OF A FEDERAL COMMON LAW WAIVER SUPERCEDING A BENEFICIARY DESIGNATION MADE UNDER ERISA PLAN DOCUMENTS COMPROMISES THE UNIFORMITY, PREDICTABILITY, AND EFFICIENCY INTENDED BY ERISA'S STATUTORY SCHEME, WHICH REQUIRES THAT THE CENTRAL MATTER OF PAYMENT OF PLAN BENEFITS MUST BE RESOLVED SOLELY UNDER ERISA AND THE PLAN DOCUMENTS.

ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). The statute governs, with breadth and detail, the rights of pension plan participants and beneficiaries, as well as the obligations of the plan with respect to the payment of benefits. *See Shaw*, 463 U.S. at 90 (ERISA's main purpose is to protect plan participants and beneficiaries). Thus, Congress has mandated that all ERISA plans be administered "in accordance with the documents and instruments governing the plan," 29 U.S.C. § 1104(a)(1)(D); that the beneficiary of an ERISA plan is the "person designated by a participant, or by the terms of an employee benefit plan," 29 U.S.C. § 1002(8); and that benefits under ERISA pension plans are not to be "assigned or alienated" away from participants and their beneficiaries, 29 U.S.C. § 1056(d)(1).

In *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001), this Court made clear that these core issues of the payment and alienation of plan benefits under an ERISA benefit plan must be determined solely under ERISA, and that state law provisions to the contrary are preempted. *Egelhoff* considered

the application to ERISA plans of a Washington statute that provided that the designation of a spouse as the beneficiary of a nonprobate asset was automatically revoked upon divorce. 532 U.S. at 143. The Court held that the statute was preempted under ERISA's expansive preemption provision (29 U.S.C. § 1144(a)). *Id.* at 146-52. The *Egelhoff* Court's reasoning is instructive, and directly relevant here.

First, the Court held that the statute, which "govern[ed] the payment of benefits, a central matter of plan administration", was impermissibly connected with ERISA plans. 532 U.S. at 147-48. Justice Thomas explained:

> [Under the statute,] administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents. The statute thus implicates an area of core ERISA concern. In particular, it runs counter to ERISA's commands that a plan shall "specify the basis on which payments are made to and from the plan," § 1102(b)(4), and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," § 1104(a)(1)(D), making payments to a "beneficiary" who is "designated by a participant, or by the terms of [the] plan." § 1002(8).

Id. at 147.

Second, the Court held that the Washington statute interfered with ERISA's mandated nationally uniform plan administration:

> The Washington statute also has a prohibited connection with ERISA plans because it interferes with nationally uniform plan administration. One

> of the principal goals of ERISA is to enable employers "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 9, 107 S. Ct. 2211, 96 L. Ed. 2d 1 (1987). Uniformity is impossible, however, if plans are subject to different legal obligations in different states. The Washington statute at issue here poses precisely that threat. Plan administrators cannot make payments simply by identifying the beneficiary specified by the plan documents. Instead they must familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been "revoked" by operation of law. And in this context the burden is exacerbated by the choice-of-law problems that may confront an administrator when the employer is located in one State, the plan participant lives in another, and the participant's former spouse lives in a third. In such a situation, administrators might find that plan payments are subject to conflicting legal obligations. . . . Requiring ERISA administrators to master the relevant laws of 50 States and to contend with litigation would undermine the congressional goal of "minimiz[ing] the administrative and financial burden[s]" on plan administrators – burdens ultimately borne by the beneficiaries.

Id. at 148-49 (footnote omitted).

The New York Court of Appeals flouted the concerns of *Egelhoff* by recognizing a federal common-law waiver of a beneficiary designation outside of the requirements of ERISA. The waiver recognized by the New York Court of Appeals does not purport to be justified by the language of ERISA or the plan documents. Rather, it was explicitly a "waiver that meets common-law requirements". 99 N.Y.2d at 404. In giving content to those "common-law requirements", the Court followed several federal circuits in applying federal common law, while looking to New York's common law of waiver as "consistent with the [ERISA] statutory scheme" and "generally consistent" with federal common-law waiver requirements. *See id.*

The creation of federal common law at odds with ERISA's statutory language is forbidden. While Congress intended for the courts to develop a federal common law under ERISA, *see, e.g., Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 377 (2002), it is beyond dispute that "[t]he authority of courts to develop a 'federal common law' under ERISA is not the authority to revise the text of the statute". *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (citation omitted).

Here, the New York Court of Appeals – avowedly following the Fifth and Seventh Circuits – has done precisely what *Mertens* forbids. It has used the cover of "federal common law" as an improper justification for re-writing ERISA. As the Sixth Circuit has explained, the statutory language of ERISA answers the question of how to determine the proper beneficiary, leaving no room for common law. *McMillan v. Parrott*, 913 F.2d 310, 311-12 (6th Cir. 1990). *Accord Metropolitan Life Ins. Co. v. Pressley*, 82 F.3d 126, 130 (6th Cir. 1996), *cert. denied*, 520 U.S. 1263 (1997) (resort

to federal common law unnecessary since ERISA supplied the answer as to the appropriate beneficiary); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 15-16 (2d Cir. 1993) (declining to create a federal common law to resolve competing claims for benefits under an ERISA plan).

ERISA expressly requires that a plan administrator discharge its duties "in accordance with the documents and instruments governing the plan. . . ", 29 U.S.C. § 1104(a)(1)(D), and prohibits "assign[ing]" or "alienat[ing]" pension benefits away from the "person designated by [the] participant or by terms of [the] employee benefit plan", 29 U.S.C. §§ 1002(8), 1056(d)(1). This "clear statutory" command requires the payment of benefits to the party duly named as beneficiary under the plan documents. *See McMillan*, 913 F.2d at 311-12 (declining to apply federal common law to vary the plan designation, though noting that waiver would not prevail under common law). This clear, bright-line rule "allows the parties to be certain of their rights and obligations". *McMillan*, 913 F.2d at 312. "Rules requiring payment to the named beneficiary yield simple administration, avoid double liability, and ensure that beneficiaries get what's coming to them without the folderol essential under less-certain rules." *McMillan*, 913 F.2d at 312 (quoting *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 283 (7th Cir. 1990) (Easterbook, J., dissenting)). Quite simply, "[i]f the designation on file controls, administrators and courts need look no further than the plan documents to determine the beneficiary, thus avoiding expensive litigation". *McMillan*, 913 F.2d at 312.

The Sixth Circuit's reasoning rejecting common-law waivers was validated by this Court's decision in *Egelhoff*, which likewise held that benefits must be paid in accordance

with the plan documents. *See Egelhoff*, 532 U.S. at 150 ("the statute at issue here directly conflicts with ERISA's requirements that plans be administered, and benefits paid, in accordance with plan documents"); *id.* at 151 n.4 (ERISA fiduciary "'shall' administer the plan 'in accordance with the documents and instruments governing the plan,'. . . . The Washington statute conflicts with this command because under this statute, the only way the fiduciary can administer the plan according to its terms is to change the very terms he is supposed to follow.") Indeed, unlike the New York of Appeals, the Supreme Court of Texas has undertaken a detailed examination of *Egelhoff* and concluded that, while "*Egelhoff* did not expressly resolve the division among" the circuits, the reasoning and rationale of *Egelhoff* required a holding that "federal common law would not be crafted . . . to provide a means for a spouse to effectively negate the beneficiary designation made under an ERISA plan". *Barnett v. Barnett*, 67 S.W.3d 107, 122, 125-26 (Tex. 2001) (holding that state community property laws could not be incorporated into federal common law to alter beneficiary designation).

Likewise, the Secretary of Labor "believes that application of federal common law . . . conflicts with the statutory scheme and the reasoning of *Egelhoff*". Brief for the Secretary of Labor, United States Dep't of Labor, as Amicus Supporting Petitioner at 2, *Keen v. Weaver*, Cause No. 01-0047 (Tex.) (February 2002), available at <http://www.dol.gov/sol/media/briefs/keenvweaver(A)-2 2002.htm> (hereinafter, "Secretary of Labor"); *see also id.* at 17 ("Although there is some appeal to honoring a clearly expressed waiver, it is more important to maintain ERISA's bright-line alienation and beneficiary designation rules. Under these rules, redesignations may be easily accomplished according to plan terms, if that is what the participant wants, but cannot otherwise be defeated.").

Significantly, when Congress has chosen to depart from ERISA's requirement that the plan beneficiary be determined exclusively from the plan documents, it has done so clearly and expressly. In the QDRO provisions, ERISA requires a plan to pay a participant's pension benefits to an alternate payee in accordance with a state "domestic relations order" if the order meets the detailed requirements that ERISA prescribes for QDROs. 29 U.S.C. § 1056(d)(3)(A). If a domestic relations order fails to meet these specific requirements, the plan may not honor the order's directives without violating ERISA's anti-alienation prohibitions. *See Boggs v. Boggs*, 520 U.S. 833, 848 (1997); S. Rep. No. 575, 98th Cong., 2d Sess. 19 (1984). Indeed, ERISA's strict QDRO requirements would make no sense if courts could simply revive failed QDROs under federal common law – yet that is precisely what the New York Court of Appeals did in this case. *See* 99 N.Y.2d at 399-400 (administrator received purported QDRO and advised plan participant to submit change of beneficiary forms if he wished to change beneficiaries).[3]

Finally, the detrimental effect on ERISA's uniform scheme will be even greater from the common-law rule fashioned by the New York Court of Appeals than from the statute rejected in *Egelhoff*. As described above, that statute provided that the designation of a spouse as beneficiary was automatically revoked upon divorce. At least in that case, the effect of the statute would usually be clear (barring choice

3. Likewise, spouses may waive their rights to their portion of a joint and survivor annuity, pursuant to 29 U.S.C. § 1055(c)(1)(A). The detail with which that provision sets forth the particular manner of waiver and the fact that ERISA is devoid of other provisions regarding a beneficiary's ability to waive benefits, further supports the conclusion that ERISA does not permit common-law waivers.

of laws issues): either a divorce occurred, or it did not. Here, in contrast, plan administrators will have no certainty short of full-blown litigation, because waiver requires a highly fact specific inquiry and, in fact, is generally a question for the jury. *See, e.g.*, *Public Serv. Co. v. Continental Cas.* Co., 26 F.3d 1508, 1517 (10th Cir. 1994); *Allstate Fin. Corp. v. Dundee Mills*, 800 F.2d 1073, 1075 (11th Cir. 1986). The cost of that litigation will, contrary to the goals of ERISA, be borne by plans and plan beneficiaries. *Cf. Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987) ("A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.").

III. CERTIORARI IS WARRANTED BECAUSE THE DECISION OF THE COURT BELOW CONFLICTS WITH DECISIONS OF THIS COURT, OTHER FEDERAL CIRCUITS, AND A STATE COURT OF LAST RESORT.

In a society where divorce and multiple families are increasingly common, the issue raised by this Petition arises frequently and with inconsistent results. *See* Secretary of Labor at 2 (describing this as a "recurring issue"). Those inconsistent results, of course, cause precisely the sort of uncertainty that ERISA seeks to avoid.

As set forth in detail in Section II, *supra*, the decision of the New York Court of Appeals conflicts with the reasoning of this Court's decision in *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

The decision of the Court of Appeals also conflicts with decisions of two federal Courts of Appeals and one state court of last resort. In particular, both the Second and Sixth Circuits have held that ERISA requires that the plan beneficiary be determined under the language of ERISA and the plan documents, and that resort to federal common law to vary the plan documents is forbidden. *McMillan v. Parrott*, 913 F.2d 310, 311-12 (6th Cir. 1990). *Accord Metropolitan Life Ins. Co. v. Pressley*, 82 F.3d 126, 130 (6th Cir. 1996), *cert. denied*, 520 U.S. 1263 (1997) (resort to federal common law unnecessary since ERISA supplied the answer as to the appropriate beneficiary); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 15-16 (2d Cir. 1993) (declining to create a federal common law to resolve competing claims for benefits under an ERISA plan). This view has also been urged unsuccessfully by Judge Easterbrook in the Seventh Circuit. *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 283 (7th Cir. 1990) (Easterbook, J., dissenting). As described above, the Supreme Court of Texas has also held that courts may not use federal common law to fashion rules that alter the beneficiary designated under ERISA and the plan documents. *Barnett v. Barnett*, 67 S.W.3d 107, 122, 125-26 (Tex. 2001).[4]

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4. Texas intermediate courts prior to *Barnett* and *Egelhoff* held that federal common law can import state waiver rules to change beneficiary designations. *Weaver v. Keen*, 43 S.W.3d 537, 543-44 (Tex. App. 2001), *review granted* (Tex., May 30, 2002); *Emmens v. Johnson*, 923 S.W.2d 705, 712 (Tex. App. 1996). In light of *Egelhoff*, another intermediate court has rejected *Weaver* and *Emmens*. *Heggy v. Am. Trading Employee Retirement Account Plan*, 56 S.W.3d 280, 285 & n.3 (Tex. App. 2001). District courts in the Third Circuit are similarly divided. *Compare Zienowiz v. Metro. Life*, 205 F. Supp. 2d 339, 343-45 (D.N.J. 2002), *with John Hancock Mut. Life Ins. Co. v. Timbo*, 67 F. Supp. 2d 413, 419-20 (D.N.J. 1999). This kind of confusion, which could be duplicated in each of the 50 states, demonstrates the need for this Court to resolve this issue.

While the New York Court of Appeals' view is rejected by the Second and Sixth Circuits and the Supreme Court of Texas, it is not an isolated error. In fact, the New York Court of Appeals is joined by the majority of federal circuits that have considered the issue, including the Fourth, Fifth, Seventh, and Eighth Circuits. *Melton v. Melton*, 324 F.3d 941, 945-46 (7th Cir. 2003) (considering waiver under federal and state common law); *Manning v. Hayes*, 212 F.3d 866, 873-74 (5th Cir. 2000) (approving consideration of federal common law, which may be determined by reference to analogous state law, and noting that the Fifth Circuit has "soundly rejected" the Sixth Circuit's "minority view"), *cert. denied*, 532 U.S 941 (2001); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1323-26 (5th Cir. 1994) (waiver governed by federal common law, the content of which is guided by state law); *Estate of Altobelli v. IBM Corp.*, 77 F.3d 78, 80-81 (4th Cir. 1996) (waiver governed by federal common law); *Lyman Lumber Co. v. Hill*, 877 F.2d 692, 693 (8th Cir. 1989) (waiver claim to be determined under federal common law).

Resolving this division among federal circuits and state courts of last resort is particularly important here because the division creates not just inconsistency (always present when there is a circuit split) but also substantial confusion for plan administrators and beneficiaries, as well as a risk of forum shopping. In particular, the existence of differing rules – waiver permitted in some states but not in others, with courts using potentially inconsistent state common law doctrines to supply content to federal common law – can create substantial uncertainty even beyond the fact-intensive jury issue of whether a waiver actually occurred. As this Court explained in refusing to require plan administrators to consult state statutes to determine the plan beneficiary,

> [T]he burden is exacerbated by the choice-of-law problems that may confront an administrator when

> the employer is located in one State, the plan participant lives in another, and the participant's former spouse lives in a third. In such a situation, administrators might find that plan payments are subject to conflicting legal obligations.

Egelhoff, 532 U.S. at 149. These concerns are even more severe here. First, unlike the bright-line statute at issue in *Egelhoff*, the New York Court of Appeals would require administrators to explore the often murky area of common-law case law, and to anticipate how a jury might apply common-law doctrines to facts that the administrator may not even know. Second, because the New York Court of Appeals' rule conflicts with the Second Circuit's rule, the administrator cannot even know which body of case law to consider until suit is filed. A similar division exists in Texas, where the state Supreme Court's view is contrary to that of the Fifth Circuit. *See Barnett*, 67 S.W.3d at 124 ("While these authorities [including Fifth Circuit authorities] provide some support for" permitting federal common law to vary the plan documents, "we are bound by . . . *Egelhoff*"). These intra-state divisions will likely also create a rush to court by potential beneficiaries in the hopes of securing a more favorable rule, thus increasing litigation.

Finally, the need for this Court to resolve this issue, and to restore uniformity of interpretation to ERISA's rules governing beneficiary designation, is demonstrated by the public importance of this issue, as recognized by the Secretary of Labor:

> [T]he Department of Labor has a significant interest in how ERISA is construed to provide for beneficiary designations under an ERISA plan. . . . Because the Secretary believes that application of

> federal common law . . . conflicts with the statutory scheme and the reasoning of *Egelhoff*, and because there is some disagreement in the courts on these issues, the Secretary submits this amicus brief to help this Court decide this recurring issue.

Secretary of Labor at 2. Because the Department of Labor is not generally a party to these recurring disputes, which are usually fought among family members of plan beneficiaries, the Department of Labor is not in a position to seek Certiorari. Granting Certiorari, however, will serve the public interests that the Department of Labor is mandated to protect.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF NEW YORK DATED AND DECIDED FEBRUARY 18, 2003

Court of Appeals of New York.

Barbara K. SILBER, Individually and as Executrix of Robert Silber, Deceased,

Respondent,

v.

Barbara A. SILBER, Appellant, et al.,

Defendants.

Jeffrey SILBER et al.,

Intervenors-Appellants.

No. 1/,9.

Argued Jan. 9, 2003.
Decided Feb. 18, 2003.

OPINION OF THE COURT

CIPARICK, J.

In the 1960s, Dr. Robert Silber enrolled in two annuity pension plans with the Teachers Insurance and Annuity Association (TIAA) and the College Retirement Equities Fund (CREF). At the time of his enrollment, Silber designated

his then-wife, defendant Barbara A. Silber, primary beneficiary of the TIAA-CREF plans, and his children contingent beneficiaries. Both plan contracts required that changes to beneficiary designations be made by filing written notice with TIAA-CREF, at their home office, in a form satisfactory to the plan administrator. Over the ensuing years, Silber several times made changes to his beneficiary designation by using a TIAA-CREF form entitled "Designation of Beneficiary."

The Silbers divorced in December 1985. The divorce decree required that Barbara A. receive 25% of any TIAA-CREF retirement benefits received during Silber's lifetime and that he designate her as a 50% beneficiary of his death benefits in the event he died before retirement. In April 1986, Silber filed the required beneficiary designation form with TIAA-CREF naming his ex-wife as 50% beneficiary of his death benefits with his four children and a friend sharing the remaining 50% in varying proportions. Silber made other changes to his beneficiary designation after the divorce, all the while maintaining Barbara A. as a 50% beneficiary of his death benefits, as required by the divorce decree.

In April 1992, Silber married plaintiff Barbara K. Silber. Thereafter, he made two changes to his death benefit beneficiary designation using TIAA-CREF beneficiary designation forms. The final change, signed on June 3, 1993, named both Barbara A. and Barbara K. as 50% beneficiaries, with the four children from the first marriage as contingent beneficiaries.

Appendix A

Silber had not retired by 1998. At the behest of defendant Barbara A. and her lawyer, the parties entered into an agreement creating separate annuities in Barbara A.'s name, providing her with immediate access to benefit payments. The new annuities were funded with 45% of the accumulations from Silber's TIAA-CREF pension plans. Approximately $925,000 of the accumulations funded the new annuities. The agreement, which was incorporated into a qualified domestic relations order (QDRO), provided:

> "3. * * * All ownership rights in the newly issued annuities will belong to Alternate Payee [Barbara A. Silber]. All ownership and interest in the balance of the accumulations in all contracts issued by the Pension Plan [TIAA-CREF] will belong to Participant [Robert Silber]. * * *
>
> "8. This Qualified Domestic Relations Order supersedes all prior orders or judgments of this Court and all prior agreements of the parties and neither party shall have any further rights against the other either under any of the prior orders or judgments of this Court or under any of the agreements between them all of which rights and/or obligations arising thereunder have been previously fully executed and satisfied. Any further rights either party has against the other or against their respective estates shall arise solely under this Qualified Domestic Relations Order.
>
> "9. Each party expressly waives any rights against the other and the other's estate and releases the

other and the other's estate from all claims, except for those rights and claims under this Qualified Domestic Relations Order.

"10. Participant's present wife, Barbara K. Silber, has signed this Order as a party and hereby waives any claim she might have to any part of Participant's Pension Plan that is being assigned to Alternate Payee herein. Barbara A. Silber waives any rights or claims she might presently have against Barbara K. Silber on her estate."

The agreement was signed by Robert Silber, Barbara A. Silber and Barbara K. Silber, as well as their respective attorneys. The QDRO was "so ordered" by a justice of the Supreme Court on May 12, 1998. On June 23, it was delivered to the TIAA-CREF plan administrator who acknowledged its receipt and agreed to "comply with all the applicable terms and conditions of said Order."

In a letter to Silber dated July 13, TIAA-CREF made reference to the QDRO and stated "[i]f you have not already done so, you may want to change the beneficiaries of your annuity contracts. If you choose to change your beneficiaries, please complete the enclosed change of beneficiary form." Silber never returned the form to TIAA-CREF, and died on November 3, 1998.

In accordance with the last beneficiary designation, TIAA-CREF distributed 50% of both plans' death benefits to plaintiff Barbara K. but did not distribute the remaining 50%. Barbara K. then commenced this action, both in her

individual capacity and as executrix of her husband's estate, seeking a declaration that she was entitled to all of the TIAA-CREF death benefits. Both parties sought summary judgment—Barbara A. on the basis of the June 3, 1993 beneficiary designation, naming her as a 50% beneficiary, and Barbara K. on the ground that Barbara A. waived her right to death benefits in the May 1998 QDRO and that the QDRO itself effected a new beneficiary designation.

Supreme Court granted Barbara A.'s motion, concluding that the language of the QDRO was not sufficiently specific to constitute a waiver. The Appellate Division reversed, following a majority of federal circuits holding that a waiver can be accomplished by an agreement that is explicit, voluntary and made in good faith—as occurred here (290 A.D.2d 156 [2002]). We now affirm.

Discussion

The Employee Retirement Income Security Act of 1974 (29 USC § 1001 *et seq.* [ERISA]) is a comprehensive federal statute "designed to promote the interests of employees and their beneficiaries in employee benefit plans" (*McCoy v. Feinman*, 99 N.Y.2d 295, 304 n. 3 [2002]). ERISA provides "a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits" (*Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 [2001], quoting *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 9 [1987]). In furtherance of the goal of uniformity, ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" (29 USC § 1144[a]; *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 [1987]).

Appendix A

A state law is related to plan administration, and thus preempted by ERISA, if the law "has a connection with or reference to such a plan" (*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 [1983]). Thus, where a state statute purports to designate the beneficiaries of an ERISA plan in a manner not provided under the ERISA scheme, it will be preempted (*see Egelhoff*, 532 U.S. at 148). Likewise, where a body of law traditionally reserved to the states, such as the law of testamentary transfers, alters the designation of a beneficiary in a manner inconsistent with uniform nationwide plan administration, it too will be preempted (*see Krishna v. Colgate Palmolive Co.*, 7 F.3d 11 [2d Cir 1993]).

Prior to enactment of the Retirement Equity Act of 1984 (Pub. L. 98-397, 98 U.S. Stat 1426[REA]), some courts questioned whether strict construction of ERISA's anti-alienation provision required preemption of court- ordered support obligations insofar as such orders affected ERISA plan administration (*see* 29 USC § 1056[d] [1]; *see e.g. American Tel. & Tel. Co. v. Merry*, 592 F.2d 118 [2d Cir 1979]). REA largely settled the debate by providing an exception to the anti-alienation provisions of ERISA through the use of a qualified domestic relations order that meets the requirements of 29 USC § 1056(d)(3)(B)-(E) (*see* 29 USC § 1056[d][3][A]).[1] In part, a QDRO is defined

1. 29 USC § 1056(d)(3)(A) provides, "Paragraph (1) [anti-alienation provision] shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order."

as a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan" (29 USC § 1056[d][3][B][i][I]). A QDRO is exempted from ERISA's preemption provisions and may be used to make dispositions of plan benefits to alternate payees (*see* 29 USC § 1144 [b][7]; *Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114, 1119-1120 [10th Cir 1991], *cert. denied* 502 U.S. 1020 [1991]). In this manner the interests of former spouses and dependent children may be balanced with those of the surviving spouse of a subsequent marriage (*see Boggs v. Boggs*, 520 U.S. 833, 847 [1997]). Thus, a QDRO may serve as a plan document that changes the beneficiary designation of an ERISA-governed plan absent the filing of a plan beneficiary designation form (*see Metropolitan Life Ins. Co. v. Bigelow*, 283 F.3d 436 [2d Cir 2002]).

Barbara A. does not dispute that the QDRO establishing a separate annuity in her favor meets ERISA's technical requirements for exemption from preemption. She claims, however, that the QDRO failed to create a new beneficiary designation—and indeed, the QDRO does not refer specifically to plan death benefits, nor does it name any individual as a beneficiary. Barbara K., however, claims Barbara A. waived her right to be a beneficiary of her ex-husband's death benefits when she entered into the 1998 QDRO. Unlike ERISA's authorization of designation of beneficiaries through a QDRO, the statute does not address whether, or how, a party can challenge a designated beneficiary based on a claim of waiver. Further, the federal courts disagree as to whether ERISA even authorizes a claim of waiver.

Appendix A

A majority of Federal Circuit Courts of Appeal have concluded, as did the Appellate Division in the present case, that waivers of beneficiary rights are possible under ERISA-governed plans (*see e.g. Manning v. Hayes*, 212 F.3d 866 [5th Cir 2000], *cert. denied* 532 U.S. 941 [2001]; *Estate of Altobelli v International Bus. Machs. Corp.*, 77 F.3d 78 [4th Cir 1996]; *Fox Val. & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275 [7th Cir 1990], *cert. denied* 498 U.S. 820 [1990]; *Lyman Lbr. Co. v. Hill*, 877 F.2d 692 [8th Cir 1989]). According to this "common-law" view, the party challenging payment to the named beneficiary is permitted to show that the beneficiary executed a waiver that meets common-law requirements. Just as ERISA's anti-alienation provisions do not preempt a valid QDRO from effecting a beneficiary designation, those provisions do not prevent a valid waiver of beneficiary interests (*see Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1324 [5th Cir 1994], *cert. denied* 513 U.S. 1081 [1995]).

As the Fifth Circuit noted in *Manning v. Hayes*, 212 F.3d 866 [2000], a "majority of the circuit courts to have considered the issue have recognized that ERISA does not expressly address the circumstances, if any, in which a non-beneficiary may avoid the payment of * * * benefits to the named beneficiary. For that reason, these courts have held that the issue is governed by federal common law. * * * Thus, * * * the determination of who is entitled to the proceeds of an ERISA plan providing * * * benefits may depend upon more than merely the plan documents, and may be properly defined by reference to * * * the particular facts of the case" (212 F.3d at 870-871 [internal citations omitted]).

Appendix A

In opposition to the waiver argument, Barbara A. relies upon *Egelhoff v. Egelhoff ex rel. Breiner* (532 U.S. 141 [2001] and other federal cases, claiming that ERISA requires a plan administrator to determine the intent and status of a QDRO it receives (*see* 29 USC § 1056[d][3][G][i]) and that a QDRO cannot provide for an option not otherwise provided under the plan (*see* 29 USC § 1056[d][3][D]). She argues that, based on these statutory commands, the United States Supreme Court determined that ERISA requires that a plan administrator discharge its duties *solely* in accordance with plan documents regardless of the variations and impact of state law.

Only one Circuit Court has unequivocally adopted Barbara A.'s position (*see McMillan v. Parrott*, 913 F.2d 310 [6th Cir 1990]).[2] That minority view, known as the "plan document" approach, would not permit any alteration of beneficiaries in an ERISA-governed plan except those that are specifically authorized by the statute. Thus, in the minority's view, only a plan document, such as a plan-generated change of beneficiary form or a QDRO that meets ERISA requirements and expressly designates a new beneficiary, can change a beneficiary designation, and courts may not apply common-law doctrines such as waiver to override an otherwise valid beneficiary designation.

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2. In *Estate of Altobelli v. International Bus. Machs. Corp.*, 77 F.3d 78, 81 [1996], the Fourth Circuit opined that *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11 [1993] placed the Second Circuit in the minority view. In *Krishna*, the plan participant purportedly changed his ERISA plan beneficiary designation in a will. The issue distilled to a conflict between New York's testamentary law and ERISA and did not involve a claim that the designated beneficiary waived his rights to payments. Thus, *Krishna* does not conflict with our conclusion here.

Appendix A

As the instant case demonstrates, there are sound reasons to maintain the availability of a waiver claim, even in the area of ERISA-governed benefit plans. Strict application of ERISA requirements, while likely serving the ends of uniformity, may not serve the ends of fairness when it comes to effectuating the clear intent of parties to an agreement. Moreover, the weight of federal authority now favors the view that a named beneficiary may waive its rights as a designated beneficiary through a waiver that meets common-law requirements.

We conclude that a claim of waiver can be asserted against a designated beneficiary if the purported waiver meets certain common-law requirements. In that regard, the federal courts look to the statute itself, as well as state law consistent with the statutory scheme (*see Fox Val. & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 281; *Clift v. Clift*, 210 F.3d 268, 271 [5th Cir 2000]). The federal common-law requirements for a valid waiver have been expressed as a straightforward tripartite test: the waiver must be explicit, voluntary and made in good faith (*see Manning*, 212 F.3d at 874). These standards are generally consistent with New York's waiver requirements in similar situations (*see e.g. Doyle v. Sullivan*, 176 A.D.2d 55 [1992]; *see also Matter of Abramovich v. Board of Educ. of Cent. School Dist. 1 of Towns of Brookhaven & Smithtown*, 46 N.Y.2d 450, 455 [1979], *cert. denied* 444 U.S. 845 [1979]).

We agree with the Appellate Division that, as a whole, the QDRO agreement effectuated a sufficiently specific waiver of Barbara A.'s rights to death benefits. Besides waiving rights against each other and their respective estates,

the parties also agreed, in paragraph 3, that ownership of the newly created annuities would belong to Barbara A. exclusively, while all rights and interests in the remaining accumulations would belong to Silber. In addition, the QDRO states that it supersedes all prior orders, which includes the prior divorce judgment that required designation of Barbara A. as a 50% beneficiary of the death benefits. Any other rights of the parties arise solely under the 1998 QDRO. Finally, the QDRO creates a mutual waiver of claims between Barbara A. and Barbara K. Taken together, the various provisions of this agreement evince an understanding among the parties that the creation of a new annuity in favor of Barbara A., an annuity amounting to 45% of all accumulations—close to one million dollars—supersedes all prior agreements.

There is little question that the agreement was entered into voluntarily by all parties. Barbara A.'s attorney contacted Silber's representatives with the idea of entering into a new arrangement. The parties had divorced in 1985 and 13 years had elapsed. Silber had remarried and was still working. Barbara A. sought a present distribution rather than waiting for her ex-husband's retirement or death. Moreover, as she conceded at a deposition, she did not expect to be a beneficiary of Silber's pension plans after the creation of her own, separate annuity under the agreement. Finally, all three parties to the QDRO agreement were represented by counsel and there is no record evidence to indicate that any of them were acting in anything other than good faith.

Application of the tripartite common-law test to the parties' agreement contained in the 1998 QDRO demonstrates

that Barbara A. Silber executed an explicit, voluntary and good faith waiver of all beneficial interests under her ex-husband's TIAA-CREF plan. Thus, she waived her right to receive the death benefits upon the filing and acceptance of the QDRO, a plan document, by the plan administrator.

Silber's four children also appeal the decision of the Appellate Division. The children argue that, in the event their mother, Barbara A., is deemed to have waived her death benefits, they should be entitled to a share of the benefits based on their status as contingent beneficiaries. This position is defeated by the clear language of the TIAA-CREF contracts.

With respect to priority of beneficiaries, the TIAA-CREF plan provisions state that, in order for members of a contingent class of beneficiaries to receive benefits, there must be no beneficiary living in a prior class. Thus, where there are two named primary beneficiaries, the absence of one such beneficiary through death, or in this case waiver, means the other primary beneficiary succeeds to the benefits as the remaining primary. The contingent beneficiaries do not take unless there is no one left in the primary beneficiary class. Silber's last two beneficiary designations of May and June 1993, along with an internal TIAA-CREF memorandum, make clear that the children were designated as contingent beneficiaries. Thus, the effect of Barbara A.'s waiver of her beneficiary designation is to leave Barbara K. as the sole beneficiary.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Appendix A

Chief Judge KAYE and Judges SMITH, WESLEY, ROSENBLATT, GRAFFEO and READ concur.

Order affirmed, with costs.

APPENDIX B — OPINION OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT DATED AND FILED FEBRUARY 26, 2002

Supreme Court, Appellate Division,
First Department, New York.

Barbara K. SILBER, etc. et al.,

Plaintiffs-Appellants,

v.

Barbara A. SILBER, et al.,

Defendants-Respondents,

Jeffrey Silber, et al.,

Defendants-Intervenors-Respondents.

Feb. 26, 2002.

* * *

MILTON L. WILLIAMS, J.P., RICHARD T. ANDRIAS, DAVID B. SAXE, RICHARD W. WALLACH and ALFRED D. LERNER, JJ.

WILLIAMS, J.P.

The main issue presented by this appeal is whether, as a matter of law, the waiver provisions of a Qualified Domestic Relations Order ("QUADRO"), executed by an ex-spouse in consideration for her ex-husband providing her with a lump

sum payment during his lifetime, constitutes an effective renunciation of her earlier designation as death beneficiary of his pension plan.

As a result of Dr. Robert Silber's employment on the staff of New York University Medical Center, he acquired a pension managed by Teachers Insurance Annuity Association and College Retirement Equity Fund ("TIAA-CREF"). When Dr. Silber divorced Barbara A. Silber in late 1985, they had been married for thirty-one years and had four children. In 1967, he had designated her on the appropriate TIAA-CREF form as beneficiary of his pension death benefits, with their children as contingent beneficiaries. Shortly before the divorce, he removed her as beneficiary, but soon thereafter restored the original designation. After the divorce, he changed the designation form again, as called for by the parties' stipulation in the divorce judgment, and designated her as the 50% beneficiary of his pension fund death benefits.

In April 1992, Dr. Silber married his second wife, Barbara K. Silber. Subsequently, in May and again in June of 1993, he executed change of beneficiary forms designating his first and second wives each as a 50% beneficiary and his four children by the first wife contingent beneficiaries.

In April 1998, Dr. Silber acceded to the first wife's request to enter the QUADRO, which was so-ordered on May 12, 1998. The sole asset it addressed was his pension retirement benefits, and it specifically referenced the Employment Retirement Income Security Act ("ERISA") and Domestic Relations Law 236, Part B. It assigned to the first

wife, as her "sole and exclusive property," a newly issued annuity created from a lump sum, inter vivos transfer of 45% of the accumulations under his pension plan, an interest valued at $925,116.55 at the time of transfer. It also included the following provisions:

> 8. This [QUADRO] supercedes all prior . . . agreements of the parties and neither party shall have any further rights against the other . . . under any of the agreements . . . Any further rights any party has against the other or against their respective estates shall arise solely under this [QUADRO].
>
> 9. Each party expressly waives any rights against the other and the other's estate and releases the other and the other's estate from all claims, except for those rights and claims under this [QUADRO].
>
> 10. Participant's present wife, Barbara K. Silber, has signed this Order as a party and hereby waives any claim she might have to any part of Participant's Pension Plan that is being assigned to [Barbara A. Silber]. Barbara A. Silber waives any rights or claims she might presently have against Barbara K. Silber on [sic] her estate.

The pension fund, in a letter to Dr. Silber dated July 13, 1998, confirmed the arrangement stated in the QUADRO and suggested that "[i]f you have not already done so, you may want to change the beneficiaries of your annuity contracts. If you choose to change your beneficiaries, please complete

the enclosed change of beneficiary form." It should be noted that the pension fund required that changes of beneficiary be made by written notice "in a form satisfactory to [the fund]" and that such changes were to be "effective from the date signed." On several prior occasions when Dr. Silber had sought to change beneficiaries, the pension fund had reminded him by written notice that he had to complete a new designation form and he did so.

Dr. Silber died on November 3, 1998. His second wife was named executrix of his estate, and shortly after his will was admitted to probate, she commenced this action, seeking, *inter alia,* a declaration that she is entitled to 100% of the TIAA-CREF death benefits retained by Dr. Silber and alleging, *inter alia,* that the QUADRO constituted a waiver and full discharge of the first wife's rights in the death benefits, and that the change of beneficiary forms executed in 1993 were superceded by the QUADRO.

Subsequently, the first wife moved for summary judgment granting her 50% of Dr. Silber's death benefits, pursuant to the last change of beneficiary form filed with the pension fund. She essentially argued that the QUADRO did not effect a change of beneficiary, that the husband was aware, as evidenced by his prior conduct, that the only way to do so was by completing and filing the pension fund's change of beneficiary form, and that he simply did not do so after the 1993 change.

The second wife cross-moved for summary judgment precluding the first wife from any share in the death benefit, arguing that the QUADRO constituted a valid waiver of any

interest the first wife had in Dr. Silber's death benefits, and that it was sufficiently specific to effect a valid modification of the pension plan beneficiary designation, thus rendering unnecessary the filing of a change of beneficiary form for that transaction.

The court granted the first wife's summary judgment motion and dismissed the second wife's complaint. It found that the language in the QUADRO was insufficiently specific in referring to the benefits in question to modify the 1993 designation of beneficiary or to waive the first wife's interest in the death benefit. It further read the QUADRO as addressing Dr. Silber's "estate," as opposed to his pension plan, dismissed as unsubstantiated the second wife's allegation that Dr. Silber had in fact submitted a change of beneficiary form subsequent to the QUADRO, designating her the sole beneficiary of his death benefit, and opined, in dicta, that if the waiver of death benefits by the first wife was valid, her children would take her share as contingent beneficiaries.

In our view, the motion court erred in granting summary judgment to Barbara A. Silber, the decedent's first wife. That determination flies in the face of the intent of the parties to the QUADRO, the intent underlying the ERISA exception providing for QUADROS, and the Federal common law on the issue of waiver in this context.

ERISA was enacted as a comprehensive Federal scheme to protect participants and beneficiaries of employee pension plans (*Manning v. Hayes,* 5th Cir., 212 F.3d 866, 870, *cert. denied* 532 U.S. 941, 121 S.Ct. 1401, 149 L.Ed.2d 345).

It expansively preempts State law in this regard (29 U.S.C.A. § 1144[a]; *Egelhoff v. Egelhoff,* 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264,; *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695). In keeping with its fundamental purpose, ERISA generally prohibits the alienation of a beneficial interest in pension plans within its coverage (29 U.S.C.A. § 1056[d][1]). However, it was expressly amended to include an exception to this rule by providing that a QUADRO, a domestic relations order which meets certain requirements, can serve as a vehicle for parties involved in domestic relations proceedings to make dispositions of plan assets (29 U.S.C.A. § 1056[d][3]; *Altobelli v. IBM,* 4th Cir., 77 F.3d 78, 81-82; *Carland v. Metropolitan Life Ins. Co.,* 10th Cir., 935 F.2d 1114, 1119, *cert. denied* 502 U.S. 1020, 112 S.Ct. 670, 116 L.Ed.2d 761). A QUADRO is also exempt from ERISA preemption (29 U.S.C.A. § 1144[b][7]; *Carland v. Metropolitan Life Ins. Co., supra* at 1119-20).

Where ERISA does not expressly address a particular issue related to its subject matter, resort may be had to Federal common law (*Altobelli v. IBM, supra* at 80 citing *Phoenix Mut. Life Ins. Co. v. Adams,* 4th Cir., 30 F.3d 554, 562). One such issue is whether a former spouse designated as the primary beneficiary of an ERISA pension plan can waive rights to pension proceeds (*Brandon v. Travelers Ins. Co.,* 5th Cir., 18 F.3d 1321, 1326, *cert. denied* 513 U.S. 1081, 115 S.Ct. 732, 130 L.Ed.2d 635 *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown,* 7th Cir., 897 F.2d 275, 278, *cert. denied* 498 U.S. 820, 111 S.Ct. 67, 112 L.Ed.2d 41 and *Lyman Lumber Co. v. Hill,* 8th Cir., 877 F.2d 692, 693),

an issue upon which the Federal circuit courts are divided as to whether guidance may be reasonably drawn from the text of ERISA itself (*see,* 29 U.S.C.A. § 1104[a][1][D]) or should be drawn from Federal common law (*Altobelli v. IBM* at 81; *see also, Manning v. Hayes, supra* at 870-74; *Brandon v. Travelers Ins. Co., supra,* at 1325-27), the latter view being the majority view. The Federal common law rule governing a plan beneficiary's waiver of benefits is that a valid waiver must be "explicit, voluntary, and made in good faith" (*Brandon v. Travelers Ins. Co., supra* at 1327, citing *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown,* 7th Cir., 897 F.2d 275, *cert. denied* 498 U.S. 820, 111 S.Ct. 67, 112 L.Ed.2d 41 and *Lyman Lumber Co. v. Hill,* 877 F.2d 692). It is not necessary that "proceeds" or "beneficiary interest" be specifically listed in order to accomplish an effective waiver of a beneficiary interest. "We will only find waiver if, upon reading the language . . . a reasonable person would have understood that she was waiving her beneficiary interest in the [plan benefits] at issue" (*Clift v. Clift,* 5th Cir., 210 F.3d 268, 271-72).

When this rule is applied to the waiver language at issue, it is clear that the motion court erred in finding it insufficient to effectuate a waiver. Essentially, the court failed to consider the QUADRO as a whole. The QUADRO complied with all the requirements listed at 29 U.S.C.A. § 1056[d][3], thus fulfilling the ERISA policy goal of providing "all the necessary information to determine the identity of a beneficiary without creating unreasonable administrative burdens for the plan administrator" (*Carland v Metropolitan Life Ins. Co., supra* at 1120). While the motion court focused its analysis on paragraph 9, it appeared to pay little heed to

the remainder of the document, such as its preamble, which clearly states that the QUADRO addresses Dr. Silber's benefits under the TIAA-CREF pension plan and the first three paragraphs, which state exactly which annuity contracts are involved and who takes what percentage of them. At paragraph 3, it expressly provides that "[a]ll ownership and interest" in the pension plan, after the transfer of 45% to Barbara A. Silber, was to revert to the husband. Paragraphs 8 and 10, *supra,* more fully define the scope of the waiver, and paragraph 10 contains mutual waivers between the first and second wives, including a waiver of claims against "[plaintiff] on [sic] her estate." Both wives are signatories to the QUADRO. Given the foregoing, the fact that Barbara A. Silber was represented by an attorney and that the QUADRO was entered into at her request, the waiver would appear to be "explicit, voluntary, and made in good faith" and should have been enforced as a plan document in accordance with Congress' intent (*see, Carland v. Metropolitan Life Ins. Co., supra* at 1121).

It should also be noted that in similar circumstances a New York court has previously upheld a waiver of pension benefits in a QUADRO, holding that

> In receiving the benefit of the [QUADRO] and in executing the release, [the ex-spouse] "received the consideration bargained for, and she became bound to fulfill her promise not to make [a] claim for retirement program death benefits" (*Doyle v. Sullivan,* 176 A.D.2d 55, 57-58, 580 N.Y.S.2d 601 [4th Dept.], quoting *Curley v. Giltrop,* 68 N.Y.2d

651, 654, 505 N.Y.S.2d 65, 496 N.E.2d 224, *rearg. denied* 68 N.Y.2d 754, 506 N.Y.S.2d 1038, 497 N.E.2d 710)

The court further misconstrued the QUADRO by reading the term "estate" in paragraph 9 in an unduly narrow, technical way such that the scope of the waiver was limited. The assumption that the technical definition of " estate" was intended because it was drafted by lawyers was unsubstantiated and muddles the plain meaning of the agreement. Finally, the court's dictum, to the effect that the children's contingency interest in the death benefit would be subordinate only to the first wife's alleged interest therein, failed to take into account the language of the relevant TIAA-CREF provisions as well as the last change of beneficiary form, dated May 20, 1993, which made the children's interests subordinate to those of both wives.

Our analysis in this matter is not affected by the recent United States Supreme Court decision in *Egelhoff v. Egelhoff,* 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264. The *Egelhoff* decision, addressing the issue of whether a State statute affecting the designation of beneficiaries should be preempted by ERISA, held that the statute at issue conflicted with and was superceded by the plain text of ERISA. As noted *supra,* preemption is not an issue here, since a QUADRO is exempted from ERISA's preemption provision (29 U.S.C.A. § 1144[b][7]). The question as to the source of Federal law used to determine the plan beneficiary was not at issue in *Egelhoff,* and the fact that the court relied on plan documents to determine the beneficiary is not inconsistent with our decision, since a QUADRO that is duly executed and filed

with the pension plan, as in the case at bar, becomes a de facto plan document (*see,* 29 U.S.C.A. § 1056[d][3][G] *et seq.; Carland v. Metropolitan Life Ins. Co., supra* at 1121-22).

For similar reasons, our analysis is not affected by the Second Circuit decision, *Krishna v. Colgate Palmolive Co.,* 7 F.3d 11, in which the Court found that the District Court's reliance on State testamentary case law to permit a decedent's use of a will provision to change the beneficiary of his ERISA-governed life insurance policy conflicted with and was preempted by ERISA. The case did not involve a QUADRO or waiver, renunciation or release by a spousal beneficiary. The Court reversed and remanded for further proceedings; hence its indication of its preference for the Federal common-law minority rule, reading ERISA at 29 U.S.C.A. § 1104[a][1][D] as mandating strict adherence to the plan's governing documents and rules, was mere dictum.

Accordingly, order and judgment (one paper), Supreme Court, New York County (Herman Cahn, J.), entered June 7, 2001, which, *inter alia,* granted defendant Barbara A. Silber's motion for summary judgment declaring her to be entitled to the disputed pension benefits pursuant to the June 3, 1993 beneficiary designation form on file with the husband's pension plan and dismissed the complaint, and denied plaintiff Barbara K. Silber's cross motion for summary judgment, should be reversed, on the law, with costs, the motion of defendant Barbara A. Silber denied, the cross motion of plaintiff Barbara K. Silber for summary judgment

granted, and it is declared that plaintiff is entitled to the pension benefits, and defendants-intervenors' counterclaim for entitlement and distribution of death benefits dismissed.

Order and judgment (one paper), Supreme Court, New York County (Herman Cahn, J.), entered June 7, 2001, reversed, on the law, with costs, the motion of defendant Barbara A. Silber for summary judgment declaring her to be entitled to the disputed pension benefits pursuant to a certain beneficiary designation form on file with the husband's pension plan denied, the cross motion of plaintiff Barbara K. Silber for summary judgment granted, and it is declared that plaintiff is entitled to the pension benefits, and defendants-intervenors' counterclaim for entitlement and distribution of death benefits dismissed.

All concur.

APPENDIX C — DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK DATED AND FILED MARCH 7, 2001

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

Index No.
601262/99

BARBARA K. SILBER, individually and as Executrix of the Estate of Robert Silber, deceased,

Plaintiffs,

-against-

BARBARA A. SILBER, TEACHERS INSURANCE ANNUITY ASSOCIATION and COLLEGE RETIREMENT EQUITIES FUND,

Defendants,

JEFFREY SILBER, MICHAEL SILBER, ANDREA SILBER DICKEY and LAURA SILBER,

Defendants-Intervenors.

Herman Cahn, J.:

This action involves the issues of whether a pension participant's ex-wife was entitled to a portion of his pension benefits, which benefits were the subject of a Qualified Domestic Relations Order ("QUADRO"), upon his death.

Specifically, by consenting to the QUADRO, did the decedent effectively change the beneficiary designations of those pension benefits to name his widow, the second wife, as sole primary beneficiary. Decedent did not file a written notice of change of beneficiary with the administrator of the pension fund, as requested by the terms of the pension agreement.

Plaintiff Barbara K. Silber ("BKS") is the widow of the late Robert Silber. Defendants Teachers Insurance Annuity Association and College Retirement Equities Fund ("TIAA-CREF") are pension funds to which the decedent Robert Silber contributed while he was employed. Defendant Barbara A. Silber ("BAS") is the decedent's ex-wife and the mother of his children, defendant-intervenors Jeffrey Silber, Michael Silber, Andrea Silber Dickey and Laura Silber. BKS, decedent's widow, has already received a 50% share of the pension benefits, which were in the funds at the time of decedent's death, as a primary beneficiary of the pension plans; the instant dispute is over the remaining 50%, which the parties represent to be valued at between $600,000 and $700,000.

Defendant BAS now moves for an order granting her summary judgment, dismissing the complaint and TIAA-CREF's interpleader complaint, and awarding her judgment on her counterclaim or awarding judgment to her children, the defendant-intervenors on the cross claim, and for other ancillary relief.

Defendant Teachers Insurance Annuity Association and College Retirement Equities Fund ("TIAA-CREF")

cross-moves for a judgment: (1) discharging it from all liability to the other parties in this action with respect to the pension payments in dispute; and (2) requiring it to pay into court the subject matter of this action and imposing terms relating to the payment of TIAA-CREF's attorneys' fees, expenses and costs, pursuant to CPLR 1006(f).

Plaintiff BKS cross-moves for: (1) summary judgment declaring her entitlement to the aforesaid death benefits, and directing BAS to file a written renunciation of those death benefits: (2) a preliminary injunction, enjoining TIAA-CREF from making any distributions to BAS and directing TIAA-CREF to retain the assets in the annuities to accumulate interest, pursuant to ¶ 9 of the Interpleader Complaint; (3) a permanent injunction, enjoining BAS from exercising right under the June 3, 1993 Beneficiary Designation; and (4) dismissing BAS's counterclaim and the defendant-intervenors' cross claim.

Facts:

Decedent and BAS had been married for a number of years. On December 13, 1985, they were divorced. On June 3, 1993, in accordance with the divorce decree, and upon his marriage to BKS, the decedent executed a Beneficiary Designation, naming BKS and BAS each as 50% beneficiaries of his TIAA-CREF death benefits. Specifically, the benefits were to be apportioned "1/2 to [BAS] if she survives the Annuitant, And 1/2 to [BKS] if she survives the Annuitant, otherwise to the following beneficiaries," specifying a portion to each of decedent's children from his marriage to BAS as will survive him. Plaintiff's Exhibit 8.

Appendix C

The Beneficiary Designation provided that it would be effective "if it is in form satisfactory to TIAA-CREF and if it is accepted by TIAA-CREF. When so accepted it shall be effective from the date it was signed." *Id.* Both the TIAA Annuity Contract and the CREF Annuity Certificate of Participation contain nearly identical language with respect to changing beneficiaries:

> 20. **Elections, Revocation of Election, and Changes**. By filing written notice with TIAA at its home office in form satisfactory to TIAA, the Annuitant may . . . change the Beneficiary, . . . No such election, . . . or change will take effect unless received by TIAA at its home office, but upon being so received will take effect as of the date the notice was signed, whether or not the Annuitant is living at the time of such receipt.

Plaintiff's Exhibit 31, TIAA Annuity Contract; *see also*, Plaintiff's Exhibit 30, CREF Annuity Certificate, section 17.

In April 1998, at BAS's request, the decedent and BAS entered into a QUADRO pursuant to which 45% of the decedent's pension funds with TIAA-CREF were transferred to BAS as her sole and exclusive property, with the decedent retaining the remaining 55%. The parties agree that the value of BAS's 45% share of these pension funds was about $925,116.55, which sum was transferred into a fund over which she has exclusive control. The QUADRO provided

that it superceded all prior orders or judgments of the court. The parties also agreed in the QUADRO:

> 9. Each party expressly waives any rights against the other and the other's estate and releases the other and the others estate from all claims, except for those rights and claims under this Qualified Domestic Relations Order.

Plaintiff's Exhibit 10.

On November 3, 1998, Robert Silber died.

Pleadings:

Plaintiff BKS brought this action seeking, in the first cause of action, a declaratory judgment declaring that she is entitled to 100% of the death benefits retained by the decedent in the TIAA-CREF pension plans. Complaint, Plaintiff's Exhibit 1. She contends that the decedent executed a change in beneficiary designation, subsequent to the QUADRO and prior to his death, naming her as the 100% beneficiary, though TIAA and CREF claim they did not receive the change in beneficiary designation. Alternatively, she seeks a declaration that BAS has, in effect formally renounced any and all death benefits in the pension plans by virtue of paragraph "9", the waiver language in the QUADRO. In the second cause of action, BKS seeks an order requiring BAS to file a written renunciation of death benefits under the June 3, 1993 Beneficiary Designation. She seeks a permanent injunction, enjoining TIAA-CREF from making any distribution of the funds to BAS (the third cause of action), and enjoining BAS

from exercising any distribution rights in the pension funds (the fourth cause of action). BKS has already received the 50% share of the remaining benefits, to which she is admittedly entitled. This action relates to the other 50%.

In their answer, BAS and the defendant-intervenor children assert that the June 3, 1993 Beneficiary Designation is the most recent beneficiary designation completed and signed by the decedent, and received by TIAA-CREF. As such, it must be given effect under the plan's provisions. Answer, Plaintiff's Exhibit 4. They claim, in their counterclaim and cross claim, that under that Beneficiary Designation, to the extent BAS might have been found to have waived her share of the death benefits, the decedent's four children are entitled to her share.

Motion and Cross-Motions:

In moving for summary judgment, BAS argues that although she obtained 45% of the amount in the pension accounts by reason of the QUADRO, the decedent had the right to make any disposition he chose of the remaining 55%. She contends that by not filing a subsequent change of designation, he chose to keep the earlier beneficiary designation in effect, and thus to give her 50% of that, as set forth in the June 3, 1993 Beneficiary Designation. The decedent made no change to that designation after the QUADRO, despite a July 13, 1998 letter from TIAA-CREF, informing him that he may want to make a change, and enclosing the necessary form. Further, she contends that the claimed "waiver" in the QUADRO lacked the specificity required to override her beneficiary rights designated in the June 3, 1993 Beneficiary Designation.

Appendix C

In opposition and in support of her cross motion, BKS contends that the proceeds of a pension plan may be transferred by a QUADRO, and a prior beneficiary designation may be changed by virtue of express and implied provisions in the QUADRO. Here, she asserts, the purpose and intent of the QUADRO was to impose a renunciation and change BAS' beneficiary rights and status. She urges that, upon finding that BAS has renounced her beneficiary rights, the court should grant her (BKS) all of the benefits. As to the defendants-intervenors, the children, they were contingent beneficiaries, and should only receive benefits if BKS did not survive the decedent and qualify for her share. Thus, she seeks summary judgment declaring her entitlement to all the remaining death benefits.

As to the main motion, in her affidavit, BKS attests that the decedent completed and mailed to TIAA-CREF a change in beneficiary form, naming her as the sole primary beneficiary. She claims that she cannot submit a copy of the form since she does not have a copy of it. Affidavit of BKS in Support of Order to Show Cause, ¶ 7. She urges that there are factual issues as to the decedent's intent regarding BAS's beneficiary rights as expressed in the QUADRO language, and whether the decedent executed and submitted a post-QUADRO change in beneficiary form.

Summary judgment is granted in favor of BAS, and it is declared that BAS did not waive her right as a beneficiary in the QUADRO, and that BKS, therefore, is not entitled to all the death benefits on the ground of waiver. It is also declared that the decedent did not effect a change in beneficiary

naming BKS as his sole beneficiary. Therefore the beneficiary designation dated June 3, 1993 remains in full force and effect and governs.

As agreed by the parties, the TIAA-CREF pension plans at issue are subject to the Employee Retirement Income Security Act as amended by the Retirement Equity Act (ERISA). ERISA preempts state laws insofar as they relate to employee benefit plans subject to its provisions. 29 USC § 1144(a); *see*, *Krishna v Colgate Palmolive Co.*, 7 F3d 11 (2d Cir 1993). Notwithstanding ERISA's preemption, ERISA contains an exception to its anti-alienation provision for transfers through the use of a QUADRO, which meets certain requirements. *See*, 29 USC 1056(d)(3) (A); *see*, *Estate of Altobelli v IBM*, 77 F3d 78 (4th Cir 1996); *Fox Valley & Vicinity Constr. Workers Pension Fund v Brown*, 897 F2d 275 (7th Cir) (en banc), *cert denied* 498 US 820 (1990). Here, the QUADRO meets the requirements of ERISA.

It is clear that a party to a QUADRO can waive a beneficiary right to pension benefits in the QUADRO. *See*, *Doyle v Sullivan*, 176 AD2d 55 (4th Dept 1992), which held that an ex-spouse may waive her interest as primary beneficiary of death benefits provided by a pension fund. In that case, also involving a TIAA-CREF pension fund, the decedent and his ex-wife had entered into a QUADRO by which TIAA-CREF was directed to transfer to the ex-wife 50% of the current value of the decedent's annuities as of a certain date. *Id.* at 56-57. In effecting that transaction, the ex-wife executed a release of "'any and all rights or interest in the balance of the Annuity(ies) on the life of Harold DePuy.'" *Id.* at 57. The court determined that, in receiving

the benefit of the QUADRO and in executing the release with that particular language, the ex-wife received the consideration she bargained for, and she was then bound to fulfill her own promise not to make a claim for pension plan death benefits. *Id.* at 58, citing *Curley v Giltrop*, 68 NY2d 651, 654 (after bench trial, court holds ex-wife intended to waive), *rearg denied* 68 NY2d 754 (1986); *see also*, *Teachers Ins. and Annuity Assn. of Am. v Rogers*, 41 AD2d 1020 (4th Dept 1973) (ex-spouse may have waived right to proceeds of life insurance policy in separation agreement); *Mohawk Airlines v Peach*, 61 AD2d 346 (4th Dept), *appeal denied* 44 NY2d 838 (1978). It is noted that the language of the QUADRO in the said action contains very specific waiver language which is not found in the instant action.

The issue here, however, is whether the parties to the QUADRO must comply with the requirements of the pension fund, TIAA-CREF, in effecting a change in beneficiary designations. Specifically, where as here, the pension fund has certain specified requirements as to the particular way in which a designation may be changed, would a QUADRO waiver which does not comply with those requirements be valid to change the designation to remove the waiving party as a beneficiary.

"As a general rule, . . . the method prescribed by the insurance contract must be followed in order to effect a change of a beneficiary." *McCarthy v Aetna Life Ins. Co.*, 92 NY2d 436, 440 (1998); *Matter of Estate of Jaccoma*, 142 AD2d 875 (3d Dept), *appeal denied* 73 NY2d 703 (1988). "Such a rule serves the paramount goals of ensuring that life insurance proceeds are disbursed consistently with an

insured's stated intent and of preventing the courts and parties from engaging in rank speculation regarding the wishes of the deceased." *McCarthy v Aetna Lift Ins. Co.*, *supra* at 440.

Although strict compliance with the prescribed method is not always required, the plaintiff must demonstrate the insured's intent to change beneficiaries by demonstrating that, "the decedent has done all that was reasonably possible to do to show his intention or has made every reasonable effort to comply with policy requirements," before a finding of substantial compliance may be made. *Id.* at 440; *Aetna Life Ins. Co. v Sterling*, 15 AD2d 334 (1st Dept), *affd* 11 NY2d 959 (1962). There must be evidence that the full success of the decedent's attempt at substantial compliance was prevented by some cause not within his control. *See*, *Schoenholz v New York Life Ins. Co.*, 234 NY 24, 30 (1922); *see*, *Connecticut Gen. Life Ins. Co. v Boni*, 48 AD2d 621 (1st Dept), *appeal dismissed* 37 NY2d 917 (1975) (failure to deliver the form warranted finding of no substantial compliance).

A number of federal courts have also determined that an ex-spouse, who is a nonparticipant in the pension plan, may waive an interest in pension benefits, through divorce settlement agreements, so long as the waiver is specific.[1]

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1. The Sixth Circuit unambiguously holds that ERISA § 1104(d), which provides that plan administrators are to discharge their duties in accordance with the documents and instruments governing the plan, obligates plan administrators to determine the beneficiary with reference to only the plan documents. Thus, it held that a divorce settlement could not effectively waive pension plan benefits because

(Cont'd)

For example, in *Clift v Clift*, 210 F3d 268 (5th Cir 2000), the court held, as a matter of law, that the ex-wife had waived her interest in the proceeds of a life insurance policy insuring her ex-husband's life. The language in the divorce decree stated that the ex-wife "'is hereby divested of all right, title, interest and claim in and to . . . [a]ny and all policies of life insurance . . . insuring the life of [ex-husband].'" *Id.* at 269. It found this waiver was voluntary, and made in good faith, and that a reasonable person would have understood, by reading that language, that she was waiving her beneficiary interest in the life insurance policy at issue. *Id.* at 271; *see also*, *Brandon v Travelers Ins. Co.*, 18 F3d 132, 1323 (5th Cir 1994), *cert denied* 513 US 1081 (1995) (ex-wife held to have waived where divorce decree stated ex-wife "'is divested of all rights, title, interest, and claim in and to such property . . . [a]ny and all sums . . . and any other rights relating to any profit-sharing plan, retirement plan, pension plan . . . or other benefit program"); *see also*, *Fox Valley & Vicinity Constr. Workers Pension Fund*, *supra* at 277 (waiver

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(Cont'd)

the plan administrator must consider only the beneficiary designation on file. *See*, *McMillan v Parrott*, 913 F2d 310, 311-12 (6th Cir 1990); *see also*, *Manning v Hayes*, 212 F3d 866 (5th Cir 2000), *cert filed* 69 USLW 3157 (Aug 16, 2000) and *Estate of Altobelli v IBM*, *supra*, discussing the Sixth Circuit's approach generally. *Estate of Altobelli v IBM*, *supra*, appears to group the Second Circuit's decision in *Krishna v Colgate Palmolive Co.*, 7 F3d 11 (2d Cir 1993), with the Sixth Circuit. Although the *Krishna* action involved an attempt to change a beneficiary of a life insurance policy through the residuary clause of the decedent's will, this court believes that it represents the views of the Second Circuit on the requirements for a change of designation.

of pension plan benefits held sufficiently specific: "'[t]he parties each waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans resulting from the employment of the other party.'"; *Estate of Altobelli v IBM*, *supra*, 77 F3d at 80 (specific waiver in settlement agreement which provided that the ex-wife "'hereby waives and transfers to the Husband any interest that she may have in the property: . . . Husband's IBM pension and other deferred compensation plans, if any.'").

The waiver language must refer to the benefits or policy proceeds at issue in order to be a binding waiver. *See*, *Manning v Hayes, supra*, 212 F3d at 869 (no waiver where prenuptial agreement, in which the parties agreed that, if the marriage terminated, neither party would assert any claim for "such things as reimbursement, aid, comfort, nor support and maintenance, and further, that neither party would assert any claim in accounts held solely in the name of the other" made no mention of employee benefits nor insurance proceeds, or of the policy sued upon in particular). Although the provision is not required to use the term "beneficiary," nevertheless the words used must be "sufficiently specific to convey the intent of the parties to divest one or the other, or both, of a beneficiary interest." *Hill v AT&T Corp.*, 125 F3d 646, 648 (8th Cir 1997) (citation omitted) (no waiver of beneficiary interest in an employee savings plan because no language inclusively releasing futures claims to the plan); *see also*, *Lyman Lumber Co. v Hill*, 877 F2d 692 (8th Cir 1989) (divorce decree language, that the husband "shall have as his own, free of any interest of [the wife], his interest in the profit-sharing plan of his employer, "did not specifically refer to or modify the

beneficiary interest of the ex-wife). It must be a specific relinquishment of the right to be named a beneficiary of the policy. *See*, *Molfetta v Connecticut Gen. Life Ins. Co.*, 138 NYS2d 168 (Sup Ct. Bronx County 1954).

Here, the waiver language in the QUADRO does not, as a matter of law, meet these requirements. First, it never specifically refers to the decedent's pension benefits at all. And, it fails to convey any intent by the parties with regard to BAS's beneficiary interest in the decedent's post-QUADRO 55% share of his pension plan. While in paragraph 9 of the QUADRO, BAS waived her rights against the decedent and his estate, the right to benefits as a beneficiary is not a right against the decedent or his estate. It is a right pursued against the pension fund. Unless it is assumed that the word "estate" was used loosely, an unlikely scenario since the parties' lawyers drafted this language for use in the QUADRO, this waiver and release do not specifically address her beneficiary right. Contrary to BKS's apparent contention, there is no ambiguity in the waiver clause warranting parol evidence or warranting the denial of summary judgment. Therefore, the QUADRO does not constitute a waiver of BAS's right as the designated beneficiary under the June 3, 1993 Beneficiary Designation.[2]

With respect to BKS's contention that the decedent effected a post-QUADRO change in beneficiary designation,

---

2. The Court further notes that even if BAS had waived her beneficiary rights, her share would go to her children, the defendant-intervenors, as the contingent beneficiaries. *See*, *Doyle v Sullivan* 176 AD2d 55 (4th Dept 1992). In neither case, would BKS be entitled to this share of the pension benefits.

naming BKS as decedent's sole primary beneficiary, summary judgment on this claim is granted in favor of BAS. BKS states in her affidavit that she personally witnessed the decedent completing and mailing the change of beneficiary form after the QUADRO was entered. She, however, has no copy of it. TIAA-CREF asserts that it did not receive that form, and under the pension plan rules, a change is only effective upon TIAA-CREF's receipt of the form.

The record is insufficient to raise a triable issue of fact concerning the decedent's attempted compliance with the pension plan rules. According to the plans, the notice for a change in beneficiary must be in writing and filed with TIAA and CREF "at its home office in form satisfactory to TIAA [and to CREF]" and no change will take effect "unless received by TIAA [and CREF] at its home office, but upon being so received will take effect as of the date the notice was signed." Plaintiffs' Exhibits 30, section 20, and 31, section 17. Thus the intention of the decedent does not determine the issue. Rather, the issue is whether TIAA-CREF received a duly executed designation. Plaintiffs' statement that she witnessed the decedent completing and mailing a form, without submitting a copy of the form, without specifying the date such events purportedly took place and without offering any other proof of mailing or delivery, fails to make the requisite showing. She makes no allegation that the decedent was in any way prevented from making the change "by some cause not within [his] control." *Schoenholz v New York Life Ins. Co.*, *supra*, at 30. Therefore, summary judgment is also granted dismissing this claim.

Appendix C

Accordingly, summary judgment is granted dismissing the complaint.

BAS is granted summary judgment in her favor on her counterclaim, and it is declared that BAS is entitled to the remaining pension benefits as a beneficiary under the June 3, 1993 Beneficiary Designation form. BKS's request for an injunction, enjoining BAS from exercising her rights under the June 3, 1993 Beneficiary Designation, is denied. The cross claim of the defendant intervenors is dismissed. TIAA-CREF is directed to pay the decedent's pension death benefits to BAS in accordance with the June 3, 1993 Beneficiary Designation form.

Upon the settlement of an order, TIAA-CREF may furnish this Court with an affidavit, served on all parties, setting forth the particulars with regard to the attorneys' fees it seeks, including the time spent and services rendered, costs and expenses. If any party objects to the sum sought, the court should be notified in writing before the settlement date. If a hearing is required, the court will thereupon schedule one. The preliminary injunction, previously issued by this court, enjoining TIAA-CREF from paying pension death benefits to BAS, is vacated.

Settle order.

Dated: March 7, 2001

ENTER:

s/ Herman Cahn

APPENDIX D — RELEVANT PROVISIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

29 U.S.C. § 1002(8). Definitions

For purposes of this subchapter

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

29 U.S.C. § 1056(d)(1). Form and payment of benefits

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

* * *

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

Appendix D

29 U.S.C. § 1104(a)(1)(D). Fiduciary duties

(a) Prudent man standard of care

(1) Subject to section 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1144(a). Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(2)

Supreme Court, U.S.
FILED
JUL 18 2003
OFFICE OF THE CLERK

No. 02-1705

IN THE

Supreme Court of the United States

BARBARA A. SILBER, *et al.*,

Petitioners,

v.

BARBARA K. SILBER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under ERISA preemption jurisprudence and the statutory scheme for employee pension plan administration, does an explicit, voluntary, good-faith waiver of divorce-driven beneficiary rights and interest in death benefits negotiated as a final settlement under a state court Qualified Domestic Relations Order [QDRO], for which $925,000 in asset value was paid, trump a lingering pre-QDRO beneficiary designation under which the paid ex-wife now recycles a further claim to payment; or, absent a filed redesignation of beneficiary form, does the statute mandate that she get a double windfall payment?

The New York Court of Appeals gave effect to the QDRO as an integrated plan document that eliminated petitioner's beneficiary rights by Waiver.

The petition-posed issue is whether the core ERISA rule reiterated in *Egelhoff v. Egelhoff*, 532 U.S. 141, 150 (2001) — that plans must be administered, and benefits paid in accordance with plan documents — precludes a QDRO-based waiver [*see* 29 U.S.C. Section 1104(a)(1)(D)] and whether uniform plan administration has been undone by the New York Court of Appeals decision.

We think not, and respectfully urge that certiorari is not warranted in this case on any of the grounds asserted in the petition.

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REASONS FOR DENYING THE WRIT[1]

I. A QDRO-CONTAINED WAIVER PROVISION IS CONSISTENT WITH BOTH THE "PLAN DOCUMENTS RULE" AND FEDERAL COMMON-LAW WAIVER DOCTRINE, MEETS ERISA'S OBJECTIVES AND DOES NOT DRAW THE CONFLICT ASSERTED IN THE PETITION

The Employee Retirement Income Security Act of 1974 ("ERISA") was amended in 1984 to create the QDRO exception to the rule against pension benefit transfers (see, 29 U.S.C. §§ 1056(d)(1), (3)(A) [Retirement Equity Act of 1984 — Pub. L. 980397; 98 U.S. Stat. 1426(REA)] and was made exempt, as a state court order, from ERISA preemption (*see* 29 U.S.C. § 1144[b][7]); *Metropolitan Life Ins. Co. v. Bigelow*, 283 F.3d 436 (2d Cir. 2002). The QDRO is now an integral part of plan administration — "each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order", 29 U.S.C. § 1056(d)(3)(A). ERISA requires the fiduciary to administer the pension plan in accordance with the documents and instruments governing the plan, 29 U.S.C. § 1104(a)(1)(D).

The primary purpose of QDRO is to facilitate interspousal property distribution and transfer of interests in otherwise inalienable pension assets. Whenever a QDRO embodies a settlement agreement between spousal parties the terms form a binding contract whereby asset value is transferred in exchange for a waiver, renunciation or release of beneficial rights and interest in the plan. The terms are

1. For purposes of opposing the petition respondent relies upon the summary of the facts contained in the opinion below.

given effect by the plan as the incorporated contract of the parties by which they were allowed to chart their own course within ERISA guidelines.

The New York Court of Appeals held that a QDRO, upon filing and acceptance by the plan, itself serves as a plan document that may modify or eliminate beneficiary rights and interest in an ERISA-governed plan, without the need to file a new beneficiary designation form. *See* 99 N.Y.2d 345, 401-402, 405 (Pet. App. 7a, 12a); *Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114 (10th Cir. 1991), *cert. denied*, 502 U.S. 1020 (1991).

Petitioner contends that certiorari is warranted, in part, because the New York Court of Appeals found a federal common-law waiver of beneficiary outside of ERISA while ERISA requires payment be made to a beneficiary named under plan documents. This ignores the fact that the subject QDRO was made a plan document by ERISA.

It would lead to an absurd result, impossible of administration, to hold that because ERISA does not specify what laws of contract apply to QDRO that ordinary contract principles cannot be invoked to construe and enforce its terms, conditions and promises or that the plain meaning of language cannot be given effect. Ordinary contract principles apply to ERISA plan document interpretation. *See Bailey v. Blue Cross & Blue Shield*, 67 F.3d 53, 57 (4th Cir. 1995).

To complicate matters further and to point out how unsuitable this case is for a grant of certiorari on the broad issue raised in the petition, it must be noted that the plan contracts themselves provide that a *settlement agreement* acknowledged under plan certificates is to be considered part

of the plan and that the plan administrator is charged with complying with its terms and conditions.

> The interest of any beneficiary, whether revocably or irrevocably named, who does not survive the Participant will vest in the Participant, or the executors or administrators of the Participant, except as otherwise provided herein or in any beneficiary designation or *settlement agreement* in effect under this certificate.

See Record On Appeal below at R151, 154; emphasis added.

Thus, the QDRO, being a "settlement agreement" under the plan documents, must be given effect as part of the plan documents by the very terms of the plan contracts and no conflict with the so-called "Plan Documents Rule" is implicated; no waiver outside of ERISA is squarely involved.

In *Carland v. Metropolitan Life Ins. Co.*, 935 F.2d 1114 (10th Cir. 1991), *cert. denied*, 502 U.S. 1020 (1991), the 10th Circuit upheld an irrevocable beneficiary designation to the ex-wife made in a qualifying divorce judgment QDRO against a subsequent beneficiary change form filed by the ex-husband where the QDRO was delivered to the plan administrators and became part of the plan records.

> . . . Because Metropolitan Life received the divorce decree and was on notice, the company had a duty to consider that decree as part of "the record" in determining the beneficiary of record under this ERISA-governed plan. Metropolitan Life's duty to pay the appropriate beneficiary taking into account the qualifying

> divorce decree, is part of the fiduciary responsibilities Congress referred to in section 1104 of the statute. *See* 29 U.S.C. § 1104.
>
> Metropolitan Life argues ERISA requires a plan administrator to look only at the plan documents to determine the beneficiary of a welfare benefit plan. In summarizing section 1104 as simply requiring fiduciaries to "discharge [their] duties with respect to a plan . . . in accordance with the documents and instruments governing the plan," Metropolitan Life fails to mention Congress included the phrase "*insofar as the instruments are consistent with the provision of this subchapter or subchapter III of this chapter.*" *See* 29 U.S.C. § 1104(a)(1)(D). Blindly paying the proceeds as specified in the insurance company's beneficiary designation forms would be inconsistent with the statutory preemption exception that recognizes the validity of domestic relations orders affecting beneficiary designations. *See* 29 U.S.C. § 1056. Because a divorce decree satisfying the statutory requirements becomes part of the record when a plan receives notice, a plan administrator complying with ERISA must take that decree into account in making a beneficiary determination.

Id. at 1121 (emphasis added).

Petitioner concedes that ERISA permits the designation of plan beneficiaries through a QDRO-plan document (Pet. 19) but argues that ERISA does not permit an existing beneficiary designation to be waived within the QDRO by

the same beneficiary, even as consideration for payment received and obliquely hints that the subject domestic relations order did not meet QDRO requirements (Pet. 19). *See* 29 U.S.C. §§ 1056(d)(3)(B), (C) and (D).[2]

II. PLAN ADMINISTRATION IS NOT COMPROMISED BY THE NEW YORK COURT OF APPEALS DECISION

Whether to designate or waive a beneficial interest, QDRO language must be explicit. There is no presumption that QDRO language (routinely drafted by experienced counsel) will be ambiguous or will not provide clear and capable direction to a plan administrator. Arguments to the contrary are highly speculative.

No extraordinary burden or threat to uniform, predictable or efficient plan administration is presented.

---

2. The latter suggestion smacks of a request for error correction of the New York Court of Appeals' finding a valid QDRO. It is axiomatic that the Supreme Court "does not grant a certiorari to review evidence and discuss particular facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925). The QDRO was delivered to the plan administrator, who accepted it, acknowledged it by a separately signed agreement, and agreed to abide by its terms and to incorporate it into the plan documents governing the pensions. It contained all the required information — names and addresses of the Participant, Alternate Payee, Pension Plan, plan contract numbers and percentages of each to be assigned to the Alternate Payee (*See* Record On Appeal below R112-113). It specifically referred to, solely concerned, and operated upon the pension annuities and assets and the Alternate Payee's rights thereafter. There could be no doubt about identification of the subject matter as to which the waiver language was intended to operate.

> No such additional burdens will be imposed because, under the ERISA statutory scheme, a plan administrator must investigate the marital history of a participant and determine whether any domestic relations orders exist that could affect the distribution of benefits. This case arose from just such an investigation. Our decision only requires plan administrators to continue their current practice of thoroughly investigating the marital status of a participant.

Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, 897 F.2d 275, 282 (9th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 820 (1990).

As a practical matter, whether contract language constitutes a waiver usually does not involve disputed questions of fact and is a matter resolved upon summary judgment motion by the court.

III. THE NEW YORK COURT OF APPEALS DECISION DID NOT REJECT THE RULE IN EGELHOFF AND IT DID NOT RELY ON STATE COMMON-LAW TO UPHOLD QDRO WAIVER; THE RULE IN EGELHOFF IS NOT "EVISCERATED" BY THE DECISION.

The cases relied upon by petitioner to support the conflict-among-circuits ground of the petition did not involve QDRO agreements. *See Melton v. Melton*, 324 F.3d 941 (7th Cir. 2003); *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000); *Estate of Altobelli v. IBM Corp.*, 77 F.3d 78 (4th Cir. 1996) (court declined to address whether the domestic relations order was a QDRO); *Brandon v. Travelers Ins. Co.*, 18 F.3d

1321 (5th Cir. 1994) (court declined to address whether divorce decree qualified as QDRO); *Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989). Those waiver-containing agreements could not claim status as plan documents or exemption from ERISA preemption. Those decisions were founded solely on recognition of federal common-law waiver doctrine. Therefore, the conflict presented by those cases is squarely outside the QDRO plane, and free of the complication of congressional intent and purposes with respect to the QDRO exception.

This Court has routinely denied certiorari to hear the issue in non-QDRO cases. *See Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Mohamed v. Kerr*, 53 F.3d 911, 914-16 (8th Cir. 1995), *cert. denied*, 516 U.S. 868 (1995); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995); *Fox Valley Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275 (7th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 820 (1990). There is even stronger reason to deny certiorari here.

Indeed, when this court decided the *Egelhoff* case it noted that certiorari was pending in *Manning v. Hayes*, a case strongly presenting the waiver-over-plan-documents reasoning (decided on other grounds), yet certiorari was ultimately denied. More than twelve years have passed since the Sixth Circuit's decision in *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990) and more than six since its decision in *Metro. Life Ins. v. Pressley*, 82 F.3d 126 (6th Cir. 1996), *cert. denied*, 520 U.S. 1263 (1997) and the split with the Sixth Circuit has not seriously impacted ERISA plan administration on a national level.

In *Egelhoff* this Court invoked ERISA conflict preemption to strike down a State beneficiary-busting statute that automatically revoked any ex-spouse beneficiary designation upon entry of a divorce decree. The main holding is that the plain text of ERISA supersedes and controls over conflicting state law. Petitioner has fixed on the Court's reiteration of the rule in the conflict preemption cases — the fiduciary shall administer in accordance with the documents and instruments governing the plan as a judicial bent against the waiver claim and the source of conflict with the New York Court of Appeals. However, in *Egelhoff*, this Court did not consider, even remotely, the issue of federal common-law waiver as it relates to QDRO or ERISA. QDRO is not a state law in conflict with ERISA, but part of ERISA itself. It does not compel plan administrators to pay benefits to beneficiaries chosen by state law rather than those identified under plan documents. ERISA merely gives to the state court the right of imprimatur to the parties' agreement in effecting alienation of ERISA plan assets — a wholly consistent ERISA objective.

In the post-Egelhoff case of *Metro. Life Ins. Co. v. Bigelow*, 283 F.3d 436 (2d Cir. 2002) the Second Circuit Court of Appeals held that there is no conflict preemption between ERISA and a QDRO beneficiary redesignation (*citing Carland, supra*). The Second Circuit was mindful of *Egelhoff* when it upheld in *Bigelow* a QDRO-mandated irrevocable beneficiary designation and struck the deceased pensioner's contrary plan document beneficiary designation.

> No material facts are in dispute. Rather, the controversy involves solely statutory interpretation — namely, whether ERISA or state law governs the determination of the proper beneficiaries. If ERISA

governs, then the Father, who is the named beneficiary in the Plans' documents, is the proper beneficiary. *See* 29 U.S.C. § 1144(a) (2000). If ERISA does not apply, or if the state-law judgment is exempt from ERISA's preemption provision, then the Daughters, who were designated "irrevocable beneficiaries" in the Stipulation, are the proper beneficiaries. *See Id.* § 1144(b)(7).

Generally, ERISA preempts state laws that "relate to" employee benefits plans. 29 U.S.C. § 1144(a). The Supreme Court has held that "a state law relates to an ERISA plan if it has connection with or reference to such a plan." *Egelhoff v. Egelhoff*, 532 U.S. 141, 147, 149 L.Ed.2d 264, 121 S.Ct. 1322 (2001) (citation and internal quotation marks omitted). To determine whether a state law has a "connection with" an ERISA plan, we look to "the objectives" of ERISA and "to the nature of the effect of the state law on ERISA plans". *Id.* (citation and internal quotation marks omitted). State laws governing the designation of plan beneficiaries, such as the law giving effect to the Judgment, "relate to" employee benefits plans and thus are subject to ERISA preemption. *Id.* at 1327-28; *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 14-16 (2nd Cir. 1993). ERISA, however, creates several exceptions to its general preemption provision, one of which is relevant here: ERISA does not preempt "qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title) . . ." 29 U.S.C. § 1144(b)(7).

* * *

> . . . We therefore join the other circuits to have considered this issue in concluding that the Section 1144(b)(7) exception to ERISA preemption applies to all QDROs, whether they involve either pension or welfare plans. *Metro Life Ins. Co. v. Pettit*, 164 F.3d 857, 863 n.5 (4th Cir.) *Metro Life Ins. Co. v. Wheaton*, 42 F.3d 1080, 1083-1084 (7th Cir. 1994); *Marsh*, 119 F.3d at 421; *Carland v. Metro Life Ins. Co.*, 935 F.2d 1114, 1119-1120 (10th Cir.), *cert denied*, 502 U.S. 1020, 116 L.Ed.2d 761, 112 S.Ct. 670 (1991).

Id. at 6-7.

The New York Court of Appeals did not rely upon New York State common law waiver rules as *ratio decideni* when it simply noted that the federal tripartite test for waiver developed under ERISA jurisprudence is consistent with New York standards (*see* 99 N.Y.2d 395, 404; Pet. App. 10a). While it is clear that where ERISA falls silent on a relevant issue federal common law may be developed to further ERISA jurisprudence [*see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Rush Prudential HMO Inc. v. Moran*, 536 U.S. 355, 377 (2002)] state common law principles may be utilized in developing federal common law only if federal common law is lacking and the state law is consistent with ERISA policies. *See Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 280 (7th Cir. 1990). Petitioner has raised the false specter of rampant infusion of preempted state law into ERISA jurisprudence. The elements of Waiver are so basic and common that they will not materially vary in state law jurisprudence from the federal tripartite common law test and there appears to be no reason to draw upon them.

IV. THE NEW YORK COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH THE SECOND CIRCUIT

Petitioner cannot rely on the pure dicta in *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11 (2d Cir. 1993) for the assertion that the Second Circuit is now aligned with the Sixth's Plan Documents Rule. In *Krishna* a pensioner sought to change his ERISA life insurance beneficiary designation by a will provision. The decision on the facts is limited to ERISA preemption of state law governing testamentary transfers; no issue of waiver was involved. The cases considered were those holding divorce to automatically vitiate prior beneficiary designation. In light of the Second Circuit's approval in *Bigelow*, *supra*, of *Carland's* recognition that QDRO is to be given effect as a plan document, there may be no real conflict of consequence demonstrated between the New York Court of Appeals and the Second Circuit to bolster this petition.

CONCLUSION

For these reasons, the petition should be denied.

Respectfully submitted,

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